NO. 35051-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ELIDORO CASTANEDA,
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable David Elofson, Judge

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# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Castaneda knowingly violated a felony no contact order.

2. The prosecutor committed prejudicial misconduct in closing and rebuttal arguments.

Issues Presented on Appeal

1. Did the state fail to prove Castaneda knowingly violated a no contact order by knowingly going to a location within 1000 feet of the protected party where he testified that he did not know where the protected party lived and did not know that his location was within 1000 feet of the protected party's former apartment?

2. Was Castaneda denied his right to a fair trial when the prosecutor in closing argument shifted the burden of proof and the presumption of innocence by arguing that Castaneda did not present evidence in his defense?

B. STATEMENT OF THE CASE

Eliodoro Salseda Castaneda was charged and convicted of violation of a no contact order. CP 1-2, 8, 39-48.

The police and the Department of Corrections (DOC) located Castaneda inside a vacant house they measured to be within 1000 feet of a protected person, Nicole Montelongo. RP 40-41, 46, 58; Exhibit 1. Defense counsel presented to the jury that Castaneda had an outstanding DOC warrant. RP 43. The state presented two prior contact order violations. Exhibit 2, 3; RP 45-47, 56-57.

According to Union Gap police officer Eric Turley, the day he contacted Castaneda, Castaneda admitted that he knew there was a no contact order in effect that prohibited him from coming within 1000 feet of Montelongo's residence, but Castaneda said he did not know where Montelongo lived. RP 55.

Ron Duffield, the owner of the building where Montelongo was a tenant, testified that Montelongo was a tenant in unit #4, but had moved out five months earlier. RP 49. Duffield testified that at times Castaneda too lived in unit #4, and that both Castaneda and Montelongo had signed the lease three years earlier. RP 50, 52. The day Castaneda was arrested Montelongo was in her apartment but Duffield had not seen Castaneda in the area for a week. RP 51.

After the state rested its case in chief, Castaneda made a half time motion to dismiss arguing that the state failed to prove that he

knew he was within 1000 feet of Montelongo. RP 62. The Court denied the motion. RP 64.

Castaneda testified on his own behalf and explained that he and Montelongo had a child together and had been in a relationship for six years. RP 65. Castaneda admitted that in the past he and Montelongo rented an apartment together but that he had moved out. RP 68. On March 7, the date of his arrest, Castaneda was in the area visiting a friend and believed that Montelongo had moved. RP 70 Castaneda did not know where Montelongo lived at that time and also did not know he was within 1000 feet of his old apartment. RP 69-70.

Closing Argument

During closing argument the prosecutor argued that Castaneda had a motive to lie:

> Who cares how this case comes out? Obviously it's the defendant. That doesn't mean he's not telling truth, that people don't ordinarily tell the truth. Excuse me. People don't ordinarily lie or not tell the truth unless they have a motive to not tell the truth. With the defendant, we can see his motive. He wants the case to come out a certain way.

RP 96-97.

The prosecutor also argued in closing that: "He never testified that she'd told him that she had moved." RP 88. During rebuttal closing the prosecutor again argued "He never said that she told him that she had moved out or anything like that." RP 97.

This timely appeal follows. CP 54-56.

## C. ARGUMENT

### 1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT OF KNOWLEDGE IN THE CHARGE OF VIOLATION OF A NO CONTACT ORDER

Castaneda challenges his conviction for felony violation of a no contact order under RCW 26.50.110(5) and RCW 10.99.020. Specifically that he knowingly violated the restraint provisions in the order and that he knowingly went to a location within 1000 feet of Montelongo's residence.

In criminal cases, this Court reviews evidence for sufficiency of the evidence by asking, "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*quoting, State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*citing State v. Green*, 94

Wn.2d 216, 220-22, 616 P.2d 628 (1980)) (plurality opinion)). The evidence is viewed in light most favorable to the state. Id.

RCW 26.50.110 provides in relevant part:

> (1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, any temporary order for protection granted under chapter 7.40 RCW pursuant to chapter 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, .....
>
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
> **(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location**;

RCW 26.50.110 (emphasis added)

The information charged Castaneda under RCW 26.50.110 (domestic violence-penalties) with knowingly violating a no contact order. Several statutes authorize no contact orders; the no contact order against Castaneda was issued under chapter 10.99 RCW (criminal procedure-domestic violence-official response). RCW

10.99.050(2)(a) provides that a "[w]illful violation of a court order ... is punishable under RCW 26.50.110." RCW 10.99.050(2)(a).

A person acts willfully under the statutory scheme if he "acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears." RCW 9A.08.010(4). Castaneda does not challenge the court's finding that a valid order prohibited him from any contact with Montelongo. Castaneda also does not challenge that a violation of the no contact order would be a felony because he has two prior convictions for violating no contact orders. RCW 26.50.110(5).

To be guilty of the offense of domestic violence felony violation of a court order, the defendant must, know of the order of protection and knowingly violate the order. *State v. Clowes*, 104 Wn. App. 935, 943-45, 18 P.3d 596 (2001) (*disapproved on other grounds in State v. Nonog,* 169 Wn.2d 220, 230-31, 237 P.3d 250 (2010)); *State v. Phillips*, 94 Wn. App. 829, 974 P.2d 1245 (1999).

"A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element." *State v. Sisemore,* 114 Wn. App. 75, 78, 55 P.2d 1178 (2002). In *Sisemore*, the Court explained that the defendant "violated the no contact order

if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no contact order if he accidentally or inadvertently contacted Cuny but immediately broke it off." *Sisemore,* 114 Wn. App. at 78.

In *Sisemore*, an officer familiar with Sisemore testified that he saw from behind, Sisemore and the protected person, and watched them walk together for 2-3 seconds. *Sisemore,* 114 Wn. App. at 76. When the police went to the protected person's house to wait, Sisemore did not show up but was later arrested based on the officer's earlier observations. Id.

Sisemore argued that the woman he was with was not the protected party. *Sisemore,* 114 Wn. App. at 79. Sisemore did not argue that the meeting was accidental. Id. The court held under a sufficiency analysis the state proved Sisemore knew of the no contact order and willfully violated the order. *Sisemore,* 114 Wn. App. at 79.

Castaneda's case is distinguishable on several grounds. First, Castaneda was not with Montelongo. Second, he testified that any violation of the no contact order was accidental because he thought Montelongo had moved and had no idea where she lived. RP 88, 97.

Viewing the evidence in the light most favorable to the state, it

is equally as probable that Castaneda did not know where Montelongo lived. Accordingly, the state failed to prove a willful violation of the no contact order. This Court must reverse and remand for dismissal with prejudice.

2. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY SHIFTING THE BURDEN TO THE DEFENDANT AND BY COMMENTING ON CASTANEDA'S RIGHT TO SILENCE.

The prosecutor committed misconduct by shifting the burden of proof to Castaneda and by commenting on his right to silence. "He never testified that she'd told him that she had moved." RP 88. During rebuttal closing the prosecutor again argued "He never said that she told him that she had moved out or anything like that." RP 97.

The due process clause of the Fourteenth Amendment guarantees, "No state shall ... deprive any person of ife, liberty, or property, without due process of law." U.S. Const. Amend. XIV section 1. The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove "beyond a reasonable doubt ... every fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged. The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington State Constitution. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson,* 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda–Perez,* 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991); *State v. Huson,* 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should also not use arguments calculated to inflame the passions or prejudices of the jury." American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett,* 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde,* 110 Wn.2d 504, 755 P.2d 174 (1988).

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor's argument was improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). This Court reviews prosecutorial misconduct under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

This Court reviews claims of improper statements in the context of the entire argument, the issues in the case, the evidence, and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Because the defense failed to object to improper argument closing and rebuttal argument, Castaneda must also establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson,* 172 Wn.2d at 443; *State v. Russell,* 125 Wn.2d 24, 26, 882 P.2d 747 (1994).

a. Prosecutor Shifted the Burden of Proof

A criminal defendant has no duty to present evidence, and it is error for the prosecutor to suggest otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 Wn.2d 830 (2003). An argument that shifts the State's burden to prove guilt beyond a reasonable doubt constitutes

misconduct. *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *Thorgerson*, 172 Wn.2d at 466. A prosecutor commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), *reviewed denied*, 131 Wn.2d 1018 (1997*); Winship*, 397 U.S. at 361-362. A prosecutor commits misconduct by implying the defense bears the burden to present evidence of innocence. *Fleming*, 83 Wn. App. at 213-214.

In *W.R., Jr.*, a rape case where the defendant was required to prove consent, the Supreme Court held that "when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist." *W.R., Jr.*, 181 Wn.2d at 764-65.

Here the issue did not involve an affirmative defense but the state did impermissibly shift the burden of the *mens rea* to Castaneda by arguing that he had to prove that his actions were not knowing. Similar to *W.R., Jr.,* this violated Castaneda's due process rights because proof that Castaneda did not know he was violating the no contact order, negates the element of knowing.

In *Fleming*, another case involving burden shifting, the prosecutor argued that to acquit the defendant it had to find that the victim was lying. *Fleming*, 83 Wn. App at 213. The Court held this argument misstated the law and impermissibly shifted the burden of proof to the defense rather than the correct burden which required acquittal if the jury did not have an abiding belief that the state proved all of the elements of the crime charged. Id.

The prosecutor also argued that if there was any evidence that the victim lied, the defense would have presented it and because the defense did not argue the victim lied, there was no proof that she lied, implying that the defendant had failed to prove his innocence. *Fleming*, 83 Wn. App at 214. "Misstating the basis on which a jury can acquit may insidiously lead, as it did here, to burden shifting". *Fleming*, 83 Wn. App. at 214.

Here as in *Fleming*, the prosecutor shifted the burden of proof by arguing that the defense bore the burden of proving reasonable doubt when it argued in both closing and rebuttal closing:

"He never testified that she'd told him that she had moved." RP 88. "He never said that she told him that she had moved out or anything like that." RP 97.

This argument is the essentially the same as the improper argument in *Fleming* where the prosecutor told the jury that if there was reasonable doubt, the defense would have established it, implying that the defense failure to prove reasonable doubt was a basis for conviction. *Fleming*, 83 Wn. App. at 214. This burden shifting is contrary to the due process requirement that the state, not the defense prove each essential element of the crime charged. *Winship*, 397 U.S. at 361-362.

Here the prosecutor's argument that Castaneda did nothing to prove his innocence, impermissibly and "insidiously" shifted the burden to the defense by arguing that Castaneda failed to establish his innocence. *Fleming*, 83 Wn. App. at 214. Here as in *Fleming*, although defense did not object to the misconduct, but it rose to the level of constitutional error and was sufficient to find reversible error because it relieved the state of its burden of proof. *Fleming*, 83 Wn. App. at 214.

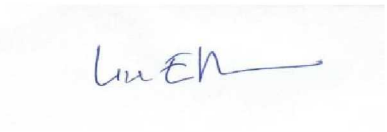
D. CONCLUSION

For the reasons presented, Mr. Castaneda respectfully requests this Court reverse and remand for dismissal with prejudice based on insufficient evidence. In the alternative, Castaneda requests

remand for a new trial based on prejudicial prosecutorial misconduct.

DATED this 8th day of June 2017.

Respectfully submitted,



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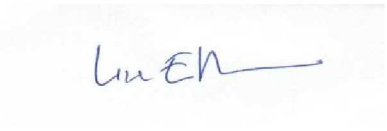
I, Lise Ellner, a person over the age of 18 years of age, served the Yakima County Prosecutor's Office (at appeals@co.yakima.wa.us) and Elidoro Castaneda/16J-01868, c/o Yakima County Department of Corrections, 111 N Front Street, Yakima, WA 98901a true copy of the document to which this certificate is affixed on June 8, 2017. Service was made by electronically to the prosecutor and to Elidoro Castaneda by depositing in the mails of the United States of America, properly stamped and addressed.



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